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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. 732

BURTON EDWARD GRAHAM, *Petitioner,*

vs.

THE UNITED STATES, *Respondent.*

PETITION FOR WRIT OF CERTIORARI to the United States Court of Claims.

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PETITION FOR WRIT OF CERTIORARI
to the United States Court of Claims.

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Claims decided, filed and entered in the above case on July 12, 1956, and the order and judgment of said court overruling petitioner's motion for a rehearing or a new trial rendered and filed on November 7, 1956.

OPINIONS BELOW.

The opinion of the United States Court of Claims is not yet officially reported, but the majority and dissenting opinions, and said Court's findings of fact and conclusions of law, are printed in Appendix "A" hereto.

JURISDICTION.

The judgment of the United States Court of Claims was made and entered on July 12, 1956. A timely motion for a rehearing or new trial was filed, and was overruled on November 7, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), 1955 (1) and 2101(c), Rules 19 and 21 of the Revised Rules of the Supreme Court of the United States, and any and all other rules of this Court affecting review by writ of certiorari.

QUESTIONS PRESENTED.

Petitioner, a former warrant officer in the United States Marine Corps, was convicted of violating certain Navy regulations after a trial before a general court martial. Proof of the essential elements of the offenses charged was largely in the form of oral and documentary evidence taken from the record of a prior Court of inquiry proceeding.

Article 60 of the Articles for the Government of the Navy, 34 U.S.C. (1946 Ed.), Sec. 1200, in force and

effect at the time[1] permitted the properly authenticated proceedings of a court of inquiry to be used as evidence under certain prescribed conditions, but only in "cases not capital, nor extending to the dismissal of a commissioned or warrant officer." Notwithstanding this statutory limitation, the sentence that the court martial nevertheless imposed by way of punishment was dismissal from the Marine Corps and from the United States Naval Service.

Petitioner thereafter commenced his suit in the United States Court of Claims to recover his loss of pay and benefits during the period following his dismissal. His contentions were: (1) that the sentence of the court martial was one that it had no jurisdiction to pronounce, and (2) that it had lost jurisdiction over the proceeding because he had been denied due process and had been deprived of rights guaranteed under the Fifth and Sixth Amendments to the Constitution of the United States. The questions posed by the decision of the Court below, therefore, revert on final analysis back to the validity and effect of the sentence and proceedings before the court martial, and are as follows:

1. Whether a court martial has the power or jurisdiction to pronounce a sentence which flaunts and willfully violates the limitations on punishment expressed by Congress in Article 60.

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[1]This case arose before the adoption of the Uniform Code of Military Justice. See 50 U.S.C. (1952 Ed.), Sec. 625, for the corresponding provision presently in effect.

2. Whether testimony previously given before a Court of inquiry may thereafter be used as evidence against an accused in a court martial case in which such use is expressly prohibited under Article 60, and also forbidden by administrative regulations and directives of the Navy, without denying due process and his right of confrontation and cross-examination of witnesses guaranteed by the Sixth Amendment to the accused, thereby causing the court martial to lose its jurisdiction over the case.

3. Whether an accused who takes the witness stand for the limited purpose of giving voir dire testimony concerning the admissibility of documentary evidence offered by the prosecution, but who is nevertheless compelled to give self-incriminating testimony on cross-examination, has been denied the protection of the Fifth Amendment.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED.

The pertinent constitutional provisions, statutes and regulations are set forth in Appendix "B".

STATEMENT OF THE CASE.

Petitioner was dismissed from the United States Marine Corps on October 4, 1948, after more than 15 years of otherwise creditable service. This was pursuant to the judgment and sentence of a general court martial convened during peace time at Tsingtao,

China, where petitioner had been stationed as a Regimental Supply Officer.

The prosecution was an outgrowth of developments during a court of inquiry which had been held primarily for the purpose of investigating suspected irregular activities on the part of his commanding officer, a Marine Corps Colonel. It developed that petitioner had been implicated in certain transactions prohibited under Navy regulations, mainly in connection with the consignment and shipment of a quantity of furs. He was therefore included as one of the principals during the progress of that proceeding.

At his subsequent trial, petitioner was confronted with six separate and distinct charges, each with a single specification,[2] all of which are set forth verbatim in the findings of the court below. (Appendix A.) All but two of the offenses were based upon acts or conduct connected in some way with the aforesaid fur consignment and shipment. The others (charges 2 and 6) were lesser offenses, involving unauthorized and improper conduct in the transportation and importation of automobiles.

In order to obtain the convictions, it was necessary for the trial judge advocate to again produce evidence, both oral and documentary, which had already been used before the court of inquiry, and made a part of its record. This included testimony previously given

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[2]This was in accordance with the practice in military tribunals of consolidating all known or suspected offenses against the accused for purposes of a single prosecution, even though they may involve completely unrelated incidents.

by two civilian witnesses, and without this vital testimony the charges against the accused could not be proved.

The two civilians were therefore both called upon to testify again at the trial of the accused. On that occasion, however, they both appeared before the court martial, but neither of them would agree to be sworn or to give further testimony, each explaining his reasons for so declining in a statement to the Court.[3]

They were both aliens who were not amendable to the compulsory process of the Navy Department. In this predicament, the judge advocate selected portions of the testimony previously given by both recalcitrant witnesses from the transcript of their testimony before the court of inquiry, and read them into evidence at the court martial trial over the objection of the accused.

During the course of the trial, the accused was also permitted to take the witness stand for the limited purpose of giving voir dire testimony concerning the competency of a written statement allegedly taken from the accused by the provost marshal, and produced by the judge advocate as evidence in the case.

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[3]Mr. Buellhoff, a Hungarian citizen, said that he had been detained by Chinese police officials for nine days upon instructions of an officer of the United States Marine Corps, and because of this duress "I do not wish to be involved with any further Marine Corps cases." (Ct. Mrtl. Rec., p. 59; Pltfs. Exh. No. 1.) The other civilian, Mr. Krinkevich, a Soviet Russian national, made the following statement: "I want to state that I never dealt with any person in the Marine Corps, and I do not know Mr. Graham, and I never dealt with him, and I do not wish to testify before the Court." (Ct. Mrtl. Rec., p. 64.)

Only three questions concerning the circumstances under which the proferred statement had been obtained were propounded by his counsel on direct examination. The judge advocate was nevertheless permitted on cross-examination to ask questions as to the truth or falsity of the matters therein set forth. These questions completely disregarded the limited scope of the voir dire examination, and elicited answers to the effect that the document was a "true statement," (Ct. Mrtl. Rec., p. 125) thereby compelling him to give self-incriminating testimony.

The court martial found the petitioner guilty as to all six charges. A single sentence was imposed on all counts, and under it the penalty of dismissal was the sentence prescribed for each of the offenses.

The proceedings, findings and sentence were subsequently approved by the convening authority and the Acting Secretary of the Navy, except as to Charge 1 which was set aside on the ground that the specifications pleaded and proved failed to state an offense. It is important to note that none of the questions here involved could be urged or presented in the course of these administrative reviews. This was because the outcome of a court martial trial is not disclosed to the accused under Navy court martial procedures until the proceedings and sentence are confirmed by the reviewing authorities. Petitioner, therefore, obviously had no way of knowing that the court had exceeded its statutory powers in the matter of punishment until the sentence was confirmed and published by the Acting Secretary of the Navy.

An application for relief was thereafter filed by petitioner with the Board for the Correction of Naval Records on July 27, 1949, under the provisions of Section 207 of the Legislative Reorganization Act of 1926. (60 Stat. 812.) While the case was under submission before this board, it rendered a decision that it had lost jurisdiction to determine the matter on its merits due to the fact that Congress had in the interim enacted the Uniform Code of Military Justice.

The final step by which he exhausted his available administrative remedies was a petition for a new trial filed with the Judge Advocate General of the Navy under the provisions of Section 12 of the Uniform Code of Military Justice. After a hearing, this petition was denied by the Judge Advocate General on September 10, 1951. Petitioner's contentions have therefore never been reviewed by any independent tribunal within the appellate hierarchy of the Navy.

Suit was filed in the Court of Claims under 28 U.S.C. 1491[4] to recover the accrued salary and benefits due to petitioner on October 13, 1952. In the decision rendered in the case by the Court below, the majority opinion stated:

> "The plaintiff says that the admission in evidence by the court martial of the testimony of Boelhoff and Krinkevich before the court of inquiry was not only a violation of Article 60, *which it undoubtedly was,* but was a violation of the Sixth Amendment to the Constitution, because it

[4] As to the right to maintain a suit of this kind, see also: *Shapiro v. The United States,* 197 C.Cls. 650; *Appell v. The United States,* 130 C.Cls. 671; *Runkle v. United States,* 122 U.S. 543.

denied him the right to be confronted by the witnesses against him."

After specifically finding that Article 60 had been violated, the majority opinion assumed, however, that the Court was being called on to hold "this 92 year old Act of Congress" unconstitutional.[5] The Court avoided the constitutional question in this case, as thus conceived in the majority opinion, by treating the kind of proof allowed under Article 60 in a restricted class of cases as being analogous to the admission of permissible evidence under the exceptions to the hearsay rule. However, the effect of the explicit limitations on punishment in cases where Article 60 is relied upon to procure a conviction was completely overlooked and was in no way discussed or referred to in this opinion.

An entirely different view of the constitutional issue here presented appears in the strong dissenting opinion. There, this issue was squarely faced in the following language:

> "We are not called upon in this case to declare unconstitutional an Act of Congress. Article 60 of the articles for the government of the Navy (34 U.S.C., sec. 1200; 1946 Ed.) has no application to the facts of this case. It applies only to cases 'not capital, nor extending to the dismissal of a commissioner or warrant officer.' In the

[5]This, although petitioner has never contended that it was; but on the contrary says, without questioning the validity of Article 60 in a proper case, that he could not be deprived of his basic constitutional rights by the unlawful use of evidence in a case where such use is expressly prohibited.

instant case plaintiff, a warrant officer, was dismissed from the service; hence, the statute has no application.

"The question is whether an accused has the constitutional right in courts-martial to be confronted by the witnesses against him. That he has, admits of no doubt, unless it be true that a citizen forfeits his rights of citizenship when he enters the service of his country in the naval or military forces. The Bill of Rights, in the Sixth Amendment to the Constitution, says, 'In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him. * * *'

"It would hardly seem necessary to cite authority for the statement that an accused is entitled to this fundamental right as much in a court-martial proceeding as in the civil courts. But if authority is wanted, it is to be found in *Burns v. Wilson,* 346 U. S. 137; *Schita v. King,* 133 F. 2d 283, *United States ex rel. Innes v. Hiatt, et al.,* 141 F. 2d 664; *Shapiro v. United States,* 107 C. Cls. 650; 69 F. Supp. 205."

On the claim that petitioner had been compelled to give self-incriminating testimony during his voir dire examination, it was the view of the Court below, as expressed in the majority opinion, that the interrogation to which the petitioner was subjected did not have any effect upon the court-martial's decision, or result in prejudice to the accused.

REASONS FOR GRANTING THE WRIT AND ARGUMENT IN SUPPORT THEREOF.

The decision below should be reviewed because it ignores the mandate of Congress, the administrative rules and regulations of the Navy Department, and the decisions of this honorable Court. It erroneously holds that the basic rights of an individual under the Constitution and naval law may be denied to members of the armed forces, and sanctions the imposition of a punishment in a court martial proceeding expressly forbidden by statute.

The decision below is in conflict with the decisions of this Court in *Mullan v. United States,* 212 U.S. 516, and *Burns v. Wilson,* 346 U.S. 137, and with other decisions of the federal courts to be hereinafter referred to. Even if it could be made to appear that it is not so in conflict, issues of far-reaching importance left undecided by this Court in *Burns v. Wilson* should now be determined. For these and other cogent reasons to be discussed more fully in the following argument, this Court should grant review.

1. An individual does not cease to be a person within the protection of the Constitution because he has joined the Army, Navy or Marine Corps, "and has taken the oath to support that Constitution with his life, if need be."[6]

That is not to say that members of the military forces are entitled to all of the procedural guaranties

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[6] *Ex Rel. Innes v. Hiatt,* 141 F.2d 664; *Schita v. King,* 133 F.2d 283; *Shapiro v. The United States,* 107 C.Cls. 650; *Burns v. Wilson,* supra.

under the Constitution to defendants in the civil courts. Certain exceptions have been recognized as being necessary in adapting the concept of due process to the pattern of military organization and command. (*Hiatt v. Brown,* 339 U.S. 103.) Congress has also made other procedural modifications to meet the exigencies of military government and discipline under its constitutional power "to make rules for the government and regulation of the land and naval forces." The fundamental protections guaranteed under the Constitution and the Bill of Rights to the humblest prisoner haled before a magistrate have never been held to be forfeited, however, because of enrollment in any of the armed services of the United States.

2. The foregoing propositions were not considered in the majority opinion below, since the majority proceeded on the erroneous assumption that the question for decision involved the constitutionality of Article 60. In order to avoid the constitutional issue, as thus supposed, the majority therefore felt constrained to hold that Article 60 was nothing more than a rule of evidence, and its violation a mere error of law which could not be collaterally reviewed.

This was definitely not in accordance with this Court's understanding when it was called upon to construe Article 60 for purposes of its decision in *Mullan v. United States,* 212 U.S. 516. The constitutional issue that arises from the unauthorized use of a court of inquiry record under this statute was more

accurately recognized and fully discussed by this Court in the opinion rendered in that case.

Mullan was a navy commander who was tried before a court martial, convened at his own request. The Navy Department had refused to grant this request unless he consented beforehand to the introduction of testimony from the records of a former court of inquiry as evidence in the case. Mullan entered into a formal stipulation by which he accepted this condition, subject to his privilege of calling other witnesses at the trial. He was convicted, and was sentenced by the court martial to dismissal from the Navy. His sentence was thereafter reduced by the President in confirming the proceedings, however, to a reduction in rank and duty. Thus, the ultimate punishment received by Mullan was not one which was contrary to the limitations prescribed in Article 60, if applicable to his case.

Mullan contended later in his suit before the Court of Claims, however, that the evidence before the court of inquiry had not been lawfully used at his subsequent trial, "as such right is limited to cases not extending to the dismissal of a commissioned or warrant officer, and a capital case, and that as a consequence the court martial was not properly organized and its proceedings were null and void."

This Court held that Mullan would have been entitled to be protected in his right to meet witnesses "face to face" under the ordinary circumstances of the case, but that this right, like the constitutional

right to trial by jury or the assistance of counsel, was a right that could be, and was, in fact, waived by Mullan.

We freely concede the statement in the majority opinion that "the confrontation provision of the Sixth Amendment is not a prohibition of all hearsay evidence." But to say that hearsay might be accepted as evidence when permitted by law certainly does not mean that evidence, the use of which is expressly forbidden under constitutional and statutory mandates, may nevertheless be used illegally and still have any standing in a Court of law.

3. Moreover, the decision of the Court below is also in direct conflict with the interpretation and construction of Article 60 consistently followed by the Navy itself. The administrative regulations and directives adopted by the Navy Department to implement Article 60 have never regarded Article 60 as a mere rule of evidence, but have always recognized and guarded against the constitutional implications that arise when the statute is improperly used. Thus, the following admonishment appears in Section 220, *Naval Courts and Boards,* 1937:

> "Where a court martial is authorized but not required to adjudge the punishment of death or dismissal upon the conviction of an offense, the proceedings of a court of inquiry may, under the terms of article 60, A.G.N., be introduced in evidence against the accused, subject to the remaining conditions prescribed in said article, *but in any case in which the proceedings of a court of inquiry are so used in evidence under article 60,*

A.G.N., the court must be careful not to adjudge a sentence extending to death or dismissal."

The maximum punishment in such instances is again pointed out by the provisions of Section 454 of the same edition of *Naval Courts and Boards:*

"In any case in which the proceedings of a court of inquiry is used in evidence by reason of the fact that oral testimony cannot be obtained, as authorized by article 60, A.G.N. and section 220 *the maximum punishment* which may be imposed for an offense committed either in time of peace or in time of war *shall not extend to death, or to the dismissal of a commissioned or warrant officer."*

These were not mere abstract rulings, but were given practical application by the Navy in dealing with a court martial case where a court of inquiry record was, in fact, used as evidence contrary to Article 60. The reviewing authorities of the Navy disapproved the proceedings, findings, and sentence for that reason with the following pertinent comments:

"Whereas article 60 of the Articles for the Government of the Navy provides for the introduction of the proceedings of courts of inquiry as evidence before courts martial, and C.M.O. No. 46, of 1917, sets forth at length the conditions under which the provisions of this article may be available, *it is obvious that in this case the aforementioned statute did not apply.* Congress cannot abridge or abrogate the constitutional rights of a person charged with crime, one of which is that he be confronted with the witnesses against him and be afforded opportunity to cross-examine

them on the evidence they may give. *In legislating that the proceedings of a court of inquiry shall be evidence before a court martial in certain defined cases, Congress did not undertake to curtail the rights of an accused but to enact a law which would render more effective court martial proceedings when certain needed witnesses were not available* by saying in effect that in a court of inquiry the defendant or person made a party thereto, having been present thereat, accorded counsel, and afforded opportunity to cross-examine witnesses against him, such evidence as witnesses may under those conditions have given may be used at a subsequent trial, if the witness who has so testified is not available, and in cases not capital *nor extending to the dismissal of a commissioned or warrant officer.*" (C.M.O. 190, 1918, 20.)

It may be true, as stated in the majority opinion below, that Article 60 "has, no doubt, been made use of in innumerable instances in cases not capital nor extending to dismissal." But how could this possibly justify its unlawful use, in a case which is capital, or which *does* extend to dismissal?

4. According to the dissenting opinion below, Article 60 has no application to the facts of this case because "it applies only to cases not capital nor extending to the dismissal of a commissioned or warrant officer." This conclusion seems to be consistent with the reasoning of this Court in the *Mullan* case.

No matter how the situation is viewed, however, the court martial was without jurisdiction to pronounce

the sentence that it did. *If Article 60 did not apply, it lost any further jurisdiction over the proceeding by denying petitioner his constitutional rights. If it did apply, the Court clearly violated the limitation on its punitive powers under the terms of the statute.* It was this latter aspect of the case that was completely overlooked, and was in no way discussed or considered in the majority opinion.

It has been settled law since the decision of this Court in *Runkle v. United States,* 122 U.S. 543, that for the sentence of a military or naval court to be recognized it must not only affirmatively and conclusively appear that the court was properly constituted and had jurisdiction in the first instance, but also that its sentence was conformable to law. There are no presumptions in its favor in so far these matters are concerned, and jurisdiction to render the particular sentence imposed is deemed as essential to its validity as jurisdiction of the person or subject matter.[7] If the court martial in fact transcended its sentencing powers under Article 60, the sentence that it rendered was a nullity, and its judgment was *coram non judice.* (*In re Mills,* 135 U.S. 263, 270.)

The limitations on the court's sentencing power in any case in which Article 60 is relied upon for the purpose of using a court of inquiry record as evidence against the accused appear, perforce, from the wording of the statute. It is apparent therefrom that such

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[7] *United States v. Daniel,* 279 F. 866; *Collins v. McDonald,* 258 U.S. 416.

evidence may not under any circumstances be used under its provisions in a case where a sentence of death or dismissal of a commissioned or warrant officer is mandatory. It would seem to follow logically that the use of evidence under the statute is permissible in all other cases, but the court martial is thereby barred from imposing one of the prohibited penalties, even though otherwise proper.

This effect of Article 60 as a curb on a court martrial's disciplinary powers has been officially recognized by the Navy Department in the references heretofore made to *Naval Courts and Boards.* Section 454 of that authority specifically states that *"the maximum punishment"* under this article "shall not extend to death or to the dismissal of a commissioned or warrant officer." It would be a travesty on justice, indeed, if a court martial could invoke the statute to procure the necessary evidence to convict the accused, and, having done so, still retain the power to do the very thing that the statute says that it can not do.

5. Petitioner submits that the Court of Claims also erred in holding that the improper cross-examination of petitioner did not infringe upon his rights under the Constitution and Article 42 of the Articles for the Government of the Navy. The latter statute provides that "no witness shall be compelled to incriminate himself *or to answer any questions which might tend to incriminate or degrade him."*

Regardless as to anything that may be inferred to the contrary in its decision, the findings of the court

below were that petitioner "took the witness stand for the limited purpose of testifying with respect to matters bearing on the admissibility of the written statements." (Finding 7, Appendix A.) The testimony that he gave was on a voir dire examination, and was limited to the competency as evidence of the aforesaid statement. Forcing the accused to say whether or not the very document that he was seeking to exclude from the record was a true statement of fact was improper and highly prejudicial. The truth of the statement was not in issue on this voir dire examination. The effect of the cross-examination was to oblige him to adopt it as true, thereby compelling him to put into evidence all the facts included in the statement, and to answer questions which did most certainly tend to incriminate him.

6. The Court of Claims had authority collaterally to review the proceedings of the court martial in petitioner's case to determine whether or not the judgment of that tribunal was wanting in jurisdiction. (*Givens v. Zerbst,* 255 U.S. 11.) Courts martial are tribunals of special and limited jurisdiction, and the federal Courts have developed the strict but simple rule that a civilian Court may look into such elementary matters as the jurisdiction of the court martial over the person of the accused and the offense charged, and its power to impose the sentence awarded.

See:

In re Grimley, 137 U.S. 147;
Hiatt v. Brown, supra.

In *Burns v. Wilson,* supra, and *Whetchell v. McDonald,* 340 U.S. 122, this Court recognized the complementary rule that a civilian court may not review the merits of or reevaluate the evidence presented in court martial proceedings, but the scope of review seems to have been expanded somewhat to include the broader considerations of the "fullness" and "fundamental fairness" of the court martial proceeding.

This case is therefore one that was well within the bounds of judicial inquiry in reviewing decisions of courts martial, as they have been thus demarcated.

The serious errors in this case are apparent on the face of the record, and it was not necessary, as in the *Burns* case, to again weigh or reevaluate the evidence and to substitute the civil Court's judgment thereon for that of the naval tribunals. It is equally clear that the naval court, in violating its own rules as well as the rights of petitioner under the Constitution, has not dealt with him fully and fairly.

As has been said, there was no appellate review in this case since it arose before the adoption of the Uniform Code of Military Justice. The only opportunity that petitioner had to present any of his present contentions was in connection with the application to the Judge Advocate General for discretionary relief. Their rejection strongly suggests that the naval authorities did not in fact give them more than *pro forma* consideration. For, after all, in denying petitioner relief, they ignored not only the Congressional mandates, but a whole series of their own rulings. In any event, when the deprivation of constitu-

tional rights is asserted collaterally, the circumstance that the same assertions may have previously been made and considered on direct appeal does not bar relief in the collateral proceeding. (*Leyra v. Denno*, 347 U.S. 556.)

Finally, the apprehension expressed in the majority opinion that a decision in petitioner's favor might lead to a multiplicity of suits involving rights under Article 60 was totally unnecessary, since it would establish a precedent only in the rare instance that the mandate of Congress might be disregarded.

CONCLUSION.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Dated, San Francisco, California,
January 24, 1957.

Respectfully submitted,
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(Appendices "A" and "B" Follow.)

Appendix "A"

MAJORITY AND DISSENTING OPINIONS OF UNITED STATES COURT OF CLAIMS AND SAID COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW.

In the United States Court of Claims

No. 508-52

(Decided July 12, 1956)

BURTON EDWARD GRAHAM v. THE UNITED STATES

Mr. Victor E. Cappa and *Mr. Leland Lazarus* for the plaintiff.

Mr. Francis X. Daly, with whom was *Mr. Assistant Attorney General George Cochran Doub,* for the defendant.

Opinion

MADDEN, *Judge,* delivered the opinion of the court:

The plaintiff was a warrant officer in the United States Marine Corps. On January 10, 1948, he was brought to trial in China before a general court-martial on six charges, which are quoted in full in our findings of fact. The charges related to fiscal transactions, (1) the receiving of falsely marked freight, (2) the issuance and use of a false bill of lading, (3) making a false request for the shipment of goods, (4) presenting a false request for counselor invoices for the shipment of goods, (5) requesting his organization to

ship goods as his personal effects which were not his personal effects, (6) importing two automobiles into China in violation of regulations.

The court-martial found the plaintiff guilty of all the charges and sentenced him to be dismissed from the Marine Corps and from the United States Naval service. The proceedings, findings and sentence were approved by the convening authority and by the Acting Secretary of the Navy on September 23, 1948, except that the Acting Secretary set aside the findings on the first charge. On October 5, 1948, the plaintiff was dismissed from the service, in accordance with the sentence of the court-martial, by order of the Secretary of the Navy.

The plaintiff sues for his salary from October 6, 1948, up to the present time because, he says, the sentence of the court-martial was void for lack of jurisdiction, and hence his discharge pursuant to the sentence was ineffective and he is, *de jure,* still in the service.

The plaintiff does not raise any question as to the original jurisdiction of the court-martial to try him. His contention is that, although properly constituted, the court-martial lost jurisdiction by (1) denying him due process of law in the course of the trial and (2) imposing a sentence in excess of its powers.

The plaintiff points to Article 60 of the Articles for the Government of the Navy, 34 U. S. C. (1946 Ed.), sec. 1200, which reads as follows:

> Article 60. Proceedings; authentication; use in evidence.

> The proceedings of courts of inquiry shall be authenticated by the signature of the president of the court and of the judge advocate, and shall, *in all cases not capital, nor extending to the dismissal of a commissioned or warrant officer,* be evidence before a court-martial, provided oral testimony can not be obtained. (Italics added.)

See 50 U. S. C. (1952 Ed.), sec. 625, for the present version of this Article. The Navy Department's administrative regulations, some of which are in the nature of instructions to its officers, caution courts-martial not to violate Article 60. See sections 220 and 454 of Naval Courts and Boards, 1937 Edition.

Before the plaintiff's trial by the court-martial, a court of inquiry had been convened by the Commanding General, Fleet Marine Force, Western Pacific. After the proceedings of the court of inquiry had begun, the plaintiff was made a party to those proceedings. In the court of inquiry proceedings, one Boellhoff had given testimony unfavorable to the plaintiff. At the plaintiff's court-martial trial, Boellhoff refused to take an oath or to testify. Thereupon the judge advocate of the court-martial, as the legal custodian of the record of the court of inquiry, offered in evidence that portion of the Boellhoff testimony which had been given after the plaintiff had been made a party to the court of inquiry proceedings. The plaintiff objected to the offer of only a portion of the court of inquiry evidence, and moved that the entire record of the court of inquiry proceedings be admitted. The court-martial admitted all of the Boellhoff testimony,

but not the rest of the court of inquiry record. There was a similar incident with regard to the testimony of one Krinkevitch, who had been a witness before the court of inquiry, but who refused to testify before the court-martial.

At the court-martial trial the judge advocate offered in evidence an incriminating statement that the plaintiff allegedly had prepared and signed prior to the trial. The plaintiff objected to its admission, and, at his own request, took the witness stand for the limited purpose of testifying as to matters bearing on the admissibility of the statement. In cross-examining him, the judge advocate asked him if the statement was true. He objected to the question on the ground that the statement had not been made under oath. His objection was overruled and the plaintiff answered that he believed that the statement was a true statement. It was thereupon admitted in evidence.

The plaintiff says that the admission in evidence by the court-martial of the testimony of Boellhoff and Krinkevitch before the court of inquiry was not only a violation of Article 60, which it undoubtedly was, but was a violation of the Sixth Amendment to the Constitution, because it denied him the right to be confronted by the witnesses against him.

It hardly needs repetition that neither this court nor any other civil court is a court of appeal from the decisions of courts-martial. *Burns v. Wilson,* 346 U. S. 137; *Hiatt v. Brown,* 339 U. S. 103; *Lucas v. United States,* 121 C. Cls. 819; *Fly v. United States,* 120 C. Cls. 482. Decisions of courts-martial are reviewed in

the military hierarchy, first by the convening authority and then by the Secretary of the Department, with the help of his legal staff. Insofar as the admission of the evidence constituted merely an error of law, we have no jurisdiction to review it. Even in professional courts, which are not required to combine judging with soldiering, errors of law are not infrequent. If a hierarchy of appeal has been set up, the error may be corrected. But the idea that a court loses jurisdiction by committing an error of law in the admission of evidence or otherwise is much too alarming to be considered.

We pass then to the question of whether the court-martial denied the plaintiff a constitutional right. We refer to Article 60, which we have quoted above. It is a positive statement by Congress that the court of inquiry evidence *shall* be evidence before a court-martial, provided oral testimony can not be obtained. This provision has been in the statutes since 1862. It has, no doubt, been made use of in innumerable instances, in cases not capital nor extending to dismissal. If the admission of such evidence is not a violation of the constitutional requirement of confrontation in cases in which the sentence may be a prison term, usually at hard labor, it can not be a violation in the plaintiff's case where the sentence was dismissal from the service without other penalty. What the plaintiff urges, then, in effect is that we hold this 92-year-old Act of Congress unconstitutional, and stand ready to entertain suits by those who, in the recent past and in the future have been convicted and dismissed from the service

in a court-martial trial in which the mandate of Congress has been followed and such evidence has been admitted.

The confrontation provision of the Sixth Amendment is not a prohibition of all hearsay evidence. It is probable that many a person has been capitally or otherwise punished since the adoption of the Sixth Amendment after a trial in which important evidence against him was the dying declaration of the victim of his alleged homicide. The justification for the admission of such hearsay is, of course, the justification for all real or supposed exceptions to the hearsay rule, *i. e.*, that the evidence is inherently trustworthy, and that direct testimony is not available. Society has had to choose between leaving itself unprotected because it was not possible to obtain the best possible evidence, and acting upon the evidence which it could get, if that evidence was worthy of belief and was believed. The Sixth Amendment has not forbidden the making of this choice. Congress, by the enactment of Article 60, expressed its positive conclusion that court of inquiry evidence is inherently trustworthy, and, if oral testimony is not available, should be admitted in most court-martial trials. It was not unconstitutional for it to so conclude.

Since we are not willing to hold, by inescapable inference, that Article 60 is an unconstitutional enactment, we cannot hold that the admission by the court-martial of the evidence here in question was a violation of a constitutional right of the plaintiff. He has, then, nothing to complain of in this regard except a

violation of Article 60. If we were sitting as a court of appeal from the court-martial, it would probably be our duty to correct the error. As we have said, we are not so sitting.

We have referred above to the incident in which the plaintiff took the witness stand for the limited purpose of testifying as to the admissibility of his prior written and allegedly incriminating statement. On cross-examination he was asked whether the statement was a true statement. He did not object to the question on the ground that he had not taken the stand to testify as to the merits of the charges. He objected on the ground that the statement had not been made under oath. It would be too much to expect of soldier judges that they would disregard the unmeritorious objection which he interposed, and direct him not to answer the question for another reason which he had not suggested. His objection was overruled and he answered that the statement was a true statement. We do not see in this single incident any compulsion upon the plaintiff to be a witness against himself. If he had not been asked the question, and had not taken the stand to deny the truth of his incriminating statement, the court-martial would have, of course, assumed that it was true. His frank answer could hardly have had any effect upon the court's decision different from the effect his silence would have had.

The plaintiff urges that the court-martial's severe sentence of dismissal was a sentence "in gross" based upon its conviction of him upon all six of the charges;

that since all of the charges except the sixth one were tainted by the inadmissible court of inquiry testimony, and so severe a sentence would not have been imposed on the sixth charge alone, the sentence was void and should be disregarded. We have explained above that we have not been entrusted with the power to determine, with any legal effect, that the evidence upon which the plaintiff was convicted upon all of the charges was inadmissible. The convictions upon all the charges but one were sustained by the appellate hierarchy to which the plaintiff subjected himself when he joined the Marines.

The plaintiff's petition will be dismissed.

It is so ordered.

Laramore, *Judge;* Littleton, *Judge;* and Jones, *Chief Judge,* concur.

Whitaker, *Judge,* dissenting:

We are not called upon in this case to declare unconstitutional an Act of Congress. Article 60 of the articles for the government of the Navy (34 U. S. C., sec. 1200; 1946 Ed.) has no application to the facts of this case. It applies only to cases "not capital, nor extending to the dismissal of a commissioned or warrant officer." In the instant case plaintiff, a warrant officer, was dismissed from the service; hence, the statute has no application.

The question is whether an accused has the constitutional right in courts-martial to be confronted by the witnesses against him. That he has admits of no doubt, unless it be true that a citizen forfeits his

rights of citizenship when he enters the service of his country in the naval or military forces. The Bill of Rights, in the Sixth Amendment to the Constitution, says, "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him. * * *"

It would hardly seem necessary to cite authority for the statement that an accused is entitled to this fundamental right as much in a court-martial proceeding as in the civil courts. But if authority is wanted, it is to be found in *Burns v. Wilson,* 346 U.S. 137; *Schita v. King,* 133 F. 2d 283; *United States ex rel. Innes v. Hiatt, et al.,* 141 F.2d 664; *Shapiro v. United States,* 107 C. Cls. 650; 69 F. Supp. 205.

When the accused was put to trial he was not confronted with the witnesses against him. Two of the witnesses, whose testimony before the Court of Inquiry was used against the accused, refused to testify in the court-martial proceedings. The findings show that at some stage of the proceedings before the Court of Inquiry the accused was made a party thereto, whatever that may signify; but they also show that some of the questions propounded to the witnesses whose testimony was read in the subsequent proceedings were propounded before plaintiff was made a party and some after. Whether plaintiff was given the right of cross-examination does not appear.

But, be that as it may, the Constitutional provision giving the accused the right to be confronted with the witnesses against him refers to the trial when his

right to life and liberty is put in jeopardy; when, as the result of the trial, he might be sentenced to death or imprisonment. This could not be done by the Court of Inquiry. Its function was merely to inquire if the accused should be put to trial. It had no right to punish. Only the court-martial had this right. It was at the court-martial trial that the accused had the right to be confronted with the witnesses against him. This right was denied him.

The rights guaranteed by the Bill of Rights were considered by our forefathers as a blood-bought heritage, to be handed down to their children, and to their children's children. They refused to leave to chance that it would be respected by the law-makers and the courts. They wrote it in the Bill of Rights as the price of their adoption of the Constitution. To them and to me these rights are more precious than the conviction of an accused, however guilty I may think him to be.

I respectfully dissent.

Findings of Fact.

The court, having considered the evidence, the briefs and argument of counsel, and the report of Commissioner Mastin G. White, makes the following findings of fact:

1. This is a suit for the collection of pay and allowances allegedly due the plaintiff as a warrant officer in the United States Marine Corps for the period subsequent to his dismissal from the service in accordance with a sentence imposed upon the plaintiff

by a general court-martial. The plaintiff contends that his dismissal was illegal.

2. The plaintiff enlisted in the United States Marine Corps on March 9, 1933, and served as an enlisted man until his appointment as a warrant officer. Plaintiff was appointed a warrant officer (QM), United States Marine Corps, on September 20, 1946, to rank from September 30, 1946. This appointment was accepted by the plaintiff on November 12, 1946.

3. On January 10, 1948, while the plaintiff was serving as a warrant officer in the United States Marine Corps, he was brought to trial at Tsingtao, China, before a general court-martial convened by order of the Commanding General, Fleet Marine Force, Western Pacific, on the following charges and specifications:

Charge I.

Receiving Articles For Freight and Traffic.

Specification.

In that Burton Edward Graham, 031226, warrant officer, U. S. Marine Corps, while so serving on temporary duty with the Seventh Service Regiment, Service Command, Fleet Marine Force, Pacific, Tientsin, China, did, during the period from July 15, 1947, to July 30, 1947, exact dates to the relator unknown, wilfully, knowingly, and without authority from the President of the United States or Secretary of the Navy, receive and cause to be received on board the duty station to which he was then and there attached, eight cases of merchandise for freight and traffic, well knowing the said merchandise did not consist

of gold, silver or jewels for freight or safekeeping, and further well knowing that the said merchandise did consist of furs, to wit, approximately ten thousand laska skins, approximately one thousand five hundred black kidskins, and approximately one thousand kolinsky skins.

Charge II.

Scandalous Conduct Tending to the Destruction of Good Morals.

Specification.

In that Burton Edward Graham, O31226, warrant officer, U. S. Marine Corps, while so serving on temporary duty with the Seventh Service Regiment, Service Command, Fleet Marine Force, Pacific, Tientsin, China, did, on or about July 18, 1947, at the aforesaid regiment, unlawfully and wrongfully conspire and cause a false and fraudulent United States government bill of lading to be prepared and used by the aforesaid regiment, whereby a civilian, to wit, a Mr. Carlo Mina, could ship automobiles at government expense, well knowing that said shipment of civilian property at government expense was unauthorized, illegal, and not in the public interest.

Charge III.

Falsehood.

Specification.

In that Burton Edward Graham, O31226, warrant officer, U. S. Marine Corps, while so serving on temporary duty with the Seventh Service Regiment, Service Command, Fleet Marine Force, Pacific, Tientsin, China, did, during the period

from July 1, 1947, to July 30, 1947, exact date to the relator unknown, cause to be delivered to the Shipping and Receiving Section, Seventh Service Regiment, Service Command, Fleet Marine Force, Pacific, Tientsin, China, a written request for shipment of personal effects, in part, as follows:

"From: Wo. Burtan [sic] E. Graham (O31226) USMC BL—534244

To: The Shipping and Receiving Section, Seventh Service Regiment, Service Command, Fleet Marine Force, Pacific.

Subject: Shipment of Personal effects, request for.

Reference: (a) Letter of instruction 1313 dtd 13Jul 46.

(b) ALNAV 423.

1. As authorized in reference (a), it is requested that shipment of my personal effects to be made to the following adress [sic]:

Wo. Burtan [sic] E. Graham (O31226) USMC
2787 California Street,
San Francisco, California.

2. This Shipment marked in compliance with reference (b), strapped with metal strap on each face of the box consist of,

US[00] 108 one box #1 8.5 254 total cube. 69.0
109 one box 3#2 8.5 254 total weight. 2,042
110 one box #3 8.5 247
111 one box #4 8.5 248
112 one box #5 8.5 254
113 one box #6 8.5 247
114 one box #7 9.0 270
115 one box #8 9.0 268

3. In compliance with reference (a), I hereby certify that the effects covered by this request for shipment contains no live ammunition, hand grenades, explosives of any kind or other articles dangerous to life.

(Signed) Burton E. Graham.
Burtan [sic] E. Graham
Wo. (O31226) USMC"

he, the said Graham, well knowing that the aforesaid request contained a false representation, namely the representation: "my personal effects", whereas in truth and in fact, he, the said Graham, well knew that the said effects were furs, said furs not being the personal property of the said Graham, and in which he, the said Graham, had no legal nor equitable interest, which said representation was knowingly false and intended to deceive, as he, the said Graham, well knew.

Charge IV.

Conduct Unbecoming an Officer and a Gentleman.

Specification.

In that Burton Edward Graham, O31226, warrant officer, U. S. Marine Corps, while so serving on temporary duty with the Seventh Service Regiment, Service Command, Fleet Marine Force, Pacific, Tientsin, China, did, on or about September 2, 1947, cause to be presented to the Consulate of the United States of America, Peiping, China, a written request for consular invoice covering the shipment of certain cases of furs, in part, as follows:

"* * Burton E. Graham of Peiping, (China) * *

Statement of Purchase.

Black Kidskin plates and Raw Laska & Kolinsky skins.

Date of purchase: May 24, 1947

Dealers name: Kwang Hwa Shih Yeh Shang Hong

Dealers address: 4, Dairen Road, 10th Ward, Tientsin
47, Tung Tanzse Hutung, Peiping

1500 Black Kidskin plates	CNC	110,000.—
		CNC 165,000,000.—
10000 Raw Laska skins	CNC	14,000.—
		CNC 140,000,000.—
1250 Raw Kolinski skins	CNC	49,000.—
		CNC 61,250,000.—
		CNC 366,250,000.—

August 16th, 1947

* * * Purchaser-consignee Burton E. Graham. San Francisco, Cal. USA * * * Seller-consignor Burton E. Graham, Peiping (China)

(signed) Burton E. Graham"

he, the said Graham, well knowing that the aforesaid request contained false representations, namely the representations: "Burton E. Graham of Peiping, China", "Purchaser-consignee Burton E. Graham", "date of purchase: May 24th, 1947", and "CNC$366,250,000.00" whereas in truth and in fact, he, the said Graham, well knew that his residence was Tientsin, China, that he, the said Graham, was not the purchaser-consignee, and that no consideration had been paid by him, the said Graham, or on his behalf in any

lawful currency or other medium of exchange to cover the selling or cost price of the subject furs; which said representations were knowingly false and intended to deceive, as he, the said Graham, well knew, and he, the said Graham, did therein and thereby exhibit a disregard of his obligations as an officer and a gentleman.

Charge V.

Violation of a Lawful Regulation Issued by the Secretary of the Navy.

Specification.

In that Burton Edward Graham, 031226, warrant officer, U. S. Marine Corps, while so serving on temporary duty with the Seventh Service Regiment, Service Command, Fleet Marine Force, Pacific, Tientsin, China, did, during the period from July 15, 1947, to September 30, 1947, exact date to the relator unknown, wrongfully and unlawfully request and direct the Shipping and Receiving Section of the said Seventh Service Regiment, to ship to the United States of America, as his personal effects, eight cases containing furs, said furs being dutiable under the customs regulations of the said United States of America, as he, the said Graham, well knew, and the said shipping and receiving section, did, pursuant to and in accordance with said request and direction take charge of and ship to the said United States of America said eight cases containing furs as aforesaid and he, the said Graham, did by means of said wrongful and unlawful request and direction, therein and thereby, knowingly, wilfully and without proper authority cause to be imported in a public vessel articles which are liable to the payment of duty.

Charge VI.

Conduct to the Prejudice of Good Order and Discipline.

Specification.

In that Burton Edward Graham, O21226, warrant officer, U. S. Marine Corps, while so serving with the First Marine Division (Reinforced), Fleet Marine Force, Tientsin, China, until June 18, 1947, and further while so serving on temporary duty with the Seventh Service Regiment, Service Command, Fleet Marine Force, Pacific, Tientsin, China, from June 18, 1947, to September 30, 1947, did, during the period from April 1, 1947, to September 1, 1947, exact date to the relator unknown, unlawfully and wrongfully import and cause to be imported certain automobiles, to wit, one 1946 Buick sedan and one 1947 Studebaker sedan, in violation of the regulations of the Board for the Temporary Regulation of Imports of the Republic of China, providing in part, in tenor, as follows:

"Schedule IV. Articles the import of which is prohibited * * * Tariff No 256b (part) Automobiles with 7 passenger capacity or less whose net f. o. b. factory cost to dealers exceeds U. S. $1,200 or equivalent, and chassis thereof."

he, the said Graham, well knowing that the net freight on board factory cost to dealers of the said cars was in excess of twelve hundred dollars United States currency, and that the passenger capacity of said cars was less than seven passengers.

4. During the trial of the plaintiff by general testify as a witness for the prosecution, refused to

court-martial, Hugo Boellhoff, who had been called to take an oath or to testify. Thereafter, the judge advocate of the court-martial produced the record of the proceedings previously had before a court of inquiry convened by the Commanding General, Fleet Marine Force, Western Pacific, at Tsingtao, China. The plaintiff had been made a party to the court of inquiry proceedings after such proceedings had begun. The judge advocate of the court-martial offered in evidence before the court-martial a portion of the court of inquiry record containing testimony which Hugo Boellhoff had given in the court of inquiry proceedings, the offer being restricted to the testimony which Boellhoff had given after the plaintiff was made a party to the court of inquiry proceedings. The plaintiff objected to the proposed restriction; and he moved that the entire record of the proceedings of the court of inquiry be admitted in evidence before the court-martial. The court-martial sustained the plaintiff's contention that the admission of Boellhoff's recorded testimony should not be restricted to the testimony that Boellhoff had given in the court of inquiry proceedings after the plaintiff was made a party to those proceedings; but the court-martial did not sustain the plaintiff's motion that the entire court of inquiry record be admitted in evidence. Thereupon, the judge advocate, as the legal custodian of the court of inquiry record, took the stand as a witness for the prosecution and read from such record questions propounded to, and answers given by, Hugo Boellhoff in the court of inquiry proceedings to prove the offenses alleged in charges I, III, IV, and V of the court-

martial case. Some of the recorded questions and answers had been asked and given before, and some after, the plaintiff was made a party to the court of inquiry proceedings.

5. During the trial of the plaintiff by general court-martial, I. Krinkevitch, who had been called to testify as a witness for the prosecution, refused to take an oath or to testify. The judge advocate of the court-martial subsequently offered in evidence the portion of the court of inquiry record referred to in finding 4 above that contained the testimony given by I. Krinkevitch in the court of inquiry proceedings. The plaintiff objected on the ground that such recorded testimony would be inconsistent with the unsworn statement that I. Krinkevitch had made before the court-martial in refusing to testify at the court-martial trial. The court-martial did not sustain the plaintiff's objection. Thereupon, the judge advocate, as the legal custodian of the court of inquiry record, took the stand as a witness for the prosecution and read from such record questions propounded to, and answers given by, I. Krinkevitch in the court of inquiry proceedings to prove the offenses alleged in charges I, III, IV, and V of the court-martial case.

6. Some of the exhibits that had been introduced in evidence before the court of inquiry referred to in findings 4 and 5 above were also introduced in evidence by the prosecution at the court-martial trial of the plaintiff to prove the offenses alleged in charges II, III, IV, and V. The plaintiff objected to the admission of such evidence without also admitting the

entire record of the proceedings of the court of inquiry in evidence before the court-martial, but his objections were not sustained by the court-martial.

7. During the plaintiff's trial by general court-martial, the judge advocate of the court-martial offered in evidence an incriminating written statement that the plaintiff allegedly had prepared and signed prior to the trial. The plaintiff objected, and, at his own request, he took the witness stand for the limited purpose of testifying with respect to matters bearing on the admissibility of the written statement. While being cross-examined, the plaintiff was asked by the judge advocate whether the written statement was a true statement. The question was objected to by the plaintiff on the ground that the statement had not been made under oath. The court-martial did not sustain the objection; and, the question being repeated, the plaintiff replied that he believed that the statement was a true statement. The written statement was admitted in evidence over the plaintiff's objection.

8. On February 28, 1948, after the general court-martial trying the plaintiff had held sessions at Peiping and Tientsin as well as at Tsingtao, the court-martial found that the specifications of all the charges had been proved, with certain exceptions and substitutions that were made by the court-martial in the specifications of charges V and VI; and the court-martial found that the plaintiff was guilty of all the charges.

9. Pursuant to its findings of guilty, the general court-martial on February 28, 1948, sentenced the

plaintiff to be dismissed from the United States Marine Corps and from the United States naval service.

10. The proceedings, findings, and sentence of the general court-martial in the plaintiffs case were approved by the convening authority on March 25, 1948.

11. The proceedings, findings, and sentence of the general court-martial in the plaintiff's case, and the action of the convening authority thereon, were approved by the Acting Secretary of the Navy on September 23, 1948, except that the findings on charge I and on the specification thereunder, and the action of the convening authority thereon, were set aside.

12. In accordance with the sentence of the general court-martial, as approved by the convening authority and by the Acting Secretary of the Navy, the plaintiff was dismissed from the United States Marine Corps and from the United States naval service on October 5, 1948, by order of the Acting Secretary of the Navy.

13. The plaintiff has exhausted all his administrative remedies, and has been denied relief by the Board for the Correction of Naval Records and by the Judge Advocate General of the Navy.

Conclusion of Law

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiff is not entitled to recover, and his petition is therefore dismissed.

Appendix "B"

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED.

A. Constitutional Provisions.

The Fifth Amendment provides in pertinent part:

> "No person shall * * * be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; * * *."

The Sixth Amendment provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him * * *."

B. Statutes.

The statutes here involved are the Articles for the Government of the Navy, 34 U.S.C. Sec. 1200. The provisions that bear directly on the present case are as follows:

> "Article 60. Proceedings; authentication; use in evidence. The proceedings of courts of inquiry shall be authenticated by the signature of the president of the court and of the judge advocate, and shall, in all cases not capital, nor extending to the dismissal of a commissioned or warrant officer, be evidence before a court-martial, provided oral testimony can not be obtained."

> "Article 42.
> * * *
> (c) Refusal of witness to appear or testify; privilege. Any person duly subpoenaed to appear as a witness before a general court-martial * * *

who willfully neglects or refuses * * * to testify * * * shall be deemed guilty of a misdemeanor * * * : *Provided, further,* that no witness shall be compelled to incriminate himself or to answer any question which might tend to criminate or degrade him."

C. Regulations.

The regulations here involved are those set forth in *Naval Courts and Boards* (1937 Ed.), issued by order of the Secretary of the Navy "for the government of all persons attached to the Naval Service."

The provisions of *Naval Courts and Boards* that bear directly on the present case are in pertinent part as follows:

"220. * * This article (Article 60) provides, in effect, that the proceedings of courts of inquiry shall be admissible in evidence before courts-martial under the following conditions:

1. That such proceedings must be 'duly authenticated by the signature of the president of the court and of the judge advocate';

2. That the case in which the proceedings are received in evidence must be one 'not capital';

3. That the case in which the proceedings are received in evidence must be one not 'extending to the dismissal of a commissioned or warrant officer';

4. That 'oral testimony can not be obtained.'

The second and third conditions above stated have been construed to mean that the proceedings of courts of inquiry shall not be admissible in evidence before a court-martial, under authority of

article 60, A.G.N., where the sentence of death or dismissal is by law made *mandatory* upon conviction of the offense charged. The sentence of death is not, under the article for the government of the Navy, mandatory upon conviction in any case triable by a naval court-martial.

Where a court-martial is authorized but not required to adjudge the punishment of death or dismissal upon the conviction of an offense, the proceedings of a court of inquiry may, under the terms of article 60, A.G.N., be introduced in evidence against the accused, subject to the remaining conditions prescribed in said article, but in any case in which the proceedings of a court of inquiry are so used in evidence under article 60, A.G.N., the court must be careful not to adjudge a sentence extending to death or dismissal. * * *"

"455. *Limitation when the record of proceedings of a court of inquiry is used.* In any case in which the proceedings of a court of inquiry is used in evidence by reason of the fact that oral testimony cannot be obtained, as authorized by article 60, A.G.N. and section 220, the maximum punishment which may be imposed for an offense committed either in time of peace or in time of war shall not extend to death, or to the dismissal of a commissioned or warrant officer. * * *"

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 732

BURTON EDWARD GRAHAM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Claims (Pet. App. i–xxi) is not yet reported.

JURISDICTION

The decision of the Court of Claims, dismissing the petition filed in that court, was entered on July 12, 1956 (Pet. App. i–xxi). A timely motion for a rehearing or new trial was overruled on November 7, 1956, and the petition for a writ of certiorari was filed on January 30, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1255 (1).

QUESTION PRESENTED

Whether, in this suit by an ex-Marine officer for pay which he would have earned had he not been dismissed from the service by sentence of a court-martial, the Court of Claims properly held that there was no basis for treating the judgment of conviction as a nullity.

STATUTES INVOLVED

The pertinent provisions of Articles 42 and 60 of the Articles for the Government of the Navy (12 Stat. 600, as amended, 34 U. S. C. (1946 Ed.) 1200) provide:

> *Article 60. Proceedings; authentication; use in evidence.* The proceedings of courts of inquiry shall be authenticated by the signature of the president of the court and of the judge advocate, and shall, in all cases not capital, nor extending to the dismissal of a commissioned or warrant officer, be evidence before a court martial, provided oral testimony cannot be obtained.
>
> *Article 42.*
>
> * * * * *
>
> (*c*) *Refusal of witness to appear or testify; privilege.* Any person duly subpoenaed to appear as a witness before a general court-martial * * * who willfully neglects or refuses * * * to testify * * * shall be deemed guilty of a misdemeanor * * *: *Provided, further,* That no witness shall be compelled to incriminate himself or to answer any question which might tend to incriminate or degrade him.

Article 76 of the Uniform Code of Military Justice (64 Stat. 132, 50 U. S. C. 663) provides:

> The appellate review of records of trial provided by this code, the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by this code, and all dismissals and discharges carried into execution pursuant to sentences by courts-martial following approval, review, or affirmation as required by this code, shall be final and conclusive, and orders publishing the proceedings of courts-martial and all action taken pursuant to such proceedings shall be binding upon all departments, courts, agencies, and officers of the United States * * *

Section 207 of the Legislative Reorganization Act, as amended (65 Stat. 655, 5 U. S. C. 191 (a)) provides:

> (a) The Secretaries of the Army, Navy. and Air Force * * * respectively, under procedures set up by them, and acting through boards of civilian officers or employees of their respective Departments, are authorized to correct any military or naval record where in their judgment such action is necessary to correct an error or remove an injustice * * *.
>
> (b) The Department concerned is authorized to pay, out of applicable current appropriations, claims of any persons * * * of amounts paid as fines, forfeitures, or for losses of pay * * * which are found to be due on account of military or naval service * * *.

STATEMENT

On January 10, 1948, petitioner, who was serving as a warrant officer in the United States Marine Corps, was brought to trial at Tsingtao, China, before a general court-martial convened by order of the Commanding Officer, Fleet Marine Force, Western Pacific (Fdgs. 2, 3, Pet. App. xi). Petitioner was charged with six offenses, each relating to fiscal transactions connected with the illegal importation of two automobiles (specifications 2 and 6, *infra*) and exportation of certain furs (specifications 1, 3, 4, 5, *infra*): (1) receiving falsely marked freight, (2) issuing a false bill of lading for shipment of an automobile, (3) making a request for the shipment of furs which he falsely represented as his personal effects, (4) presenting a false request for consular invoices for the shipment of said furs, (5) requesting the shipment of the furs as personal effects when aware that they were not personal effects, and (6) importing two automobiles into China in violation of regulations (Fdg. 3, Pet. App. xi–xvii).

Prior to the court-martial proceedings, a court-of-inquiry had been convened by the Commanding General, Fleet Marine Force, Western Pacific, and Hugo Boellhoff and I. Krinkevitch, witnesses at this inquiry, had given testimony unfavorable to petitioner (Fdg. 4, Pet. App. xvii–xix). At the court-martial, these same witnesses were called by the prosecution, but they refused to take an oath or repeat their testimony, and, since they were both aliens, they were not amenable to compulsory process (Pet. 6). The judge advocate of the trial then offered to read into

the record a transcript of that portion of the court-of-inquiry record pertaining to the activities of petitioner; but, since petitioner was only made a party to the court-of-inquiry proceedings after they had begun, the offer was limited to testimony taken subsequent to the time he became a party. Petitioner objected and insisted that the entire court-of-inquiry record be admitted, and the court-martial allowed the motion to the extent that it admitted all testimony of the two witnesses though not the entire record as requested (Fdg. 4, Pet. App. xvii–xix).

During the court-martial, an incriminating written statement, allegedly prepared and signed by petitioner prior to trial, was offered in evidence (Fdg. 7, Pet. App. xx). Petitioner objected and at his own request took the stand to testify as to matters bearing on the admissibility of the writing. During cross-examination, he was asked by the judge-advocate whether the statement was true. The court-martial overruled petitioner's objection that the question need not be answered because the writing had not been executed under oath, and petitioner then answered that he thought the statement was true. (Fdg. 7, Pet. App. xx.)

On February 28, 1948, the court-martial found petitioner guilty on all charges and sentenced him to be dismissed from the United States Marine Corps (Fdgs. 8, 9, Pet. App. xx–xxi). The proceedings, findings, and sentence were approved by the convening authority and, with the exception of the findings on the first charge which were set aside, were also approved by the Acting Secretary of the Navy (Fdgs. 10, 11, Pet. App. xxi). On October 6, 1948, petitioner was dismissed from the

service by order of the Acting Secretary (Fdg. 12, Pet. App. xxi); and was subsequently denied relief by the Board for the Correction of Naval Records and, after hearing, by the Judge Advocate General of the Navy (Fdg. 13, Pet. App. xxi).

Petitioner then initiated this action in the Court of Claims, suing for back pay since the date he was dismissed from the service. He alleged that the sentence of the court-martial was void, and consequently that his discharge was ineffective, because the court, though properly constituted, lost jurisdiction by denying him constitutionally protected rights in the course of the trial. According to petitioner's complaint, jurisdiction of the court-martial was invalidated (1) by admitting the testimony of witnesses Boellhoff and Krinkevitch in violation of Article 60 of the Articles for the Government of the Navy (see p. 2, *supra*), as well as the confrontation provisions of the Sixth Amendment and (2) by compelling petitioner to give self-incriminating testimony in violation of the Fifth Amendment (Pet. App. ii).

The Court of Claims dismissed the complaint. Though assuming that it had jurisdiction to entertain an action for back pay based upon a collateral attack on a court-martial judgment, the court held that a court-martial decision was not subject to judicial review for mere errors of law. The court further concluded that petitioner was denied no fundamental or constitutionally protected right during the court-martial proceedings and therefore that the jurisdiction of the court-martial remained unimpaired.

ARGUMENT

As in *Krivoski* v. *United States*, No. 533, this Term, certiorari denied on December 17, 1956, 352 U. S. 954, the Government's first position is that the Court of Claims had no jurisdiction to entertain this action. Assuming, however, that there was jurisdiction, we submit that the decision, in dismissing petitioner's complaint, was in accord with settled doctrines enunciated in this Court and the court below, and that there has been no violation of petitioner's constitutional rights.

1. This Court has repeatedly reaffirmed the settled rule that civil tribunals do not sit in review of court-martial convictions "save only as [Congress] has granted judicial power 'to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of restraint of liberty.'" *In re Yamashita*, 327 U. S. 1, 8; see also *Hiatt* v. *Brown*, 339 U. S. 103, 111; *Swaim* v. *United States*, 165 U. S. 553, 562; *Whelchel* v. *McDonald*, 340 U. S. 122, 126. "[I]t is equally well settled that in the absence of physical confinement the courts cannot interfere with nor in any way review court-martial proceedings", *Goldstein* v. *Johnson*, 87 App. D. C. 159, 160, 184 F. 2d 342, 343, certiorari denied, 340 U. S. 879. The unqualified nature of this doctrine was emphasized in the leading case of *Wales* v. *Whitney*, 114 U. S. 564, 570, where this Court declared, "If there is no restraint there is no right in the civil court to interfere. Its power *then* extends no further than to release the prisoner. It cannot remit a fine, or restore to an office, or reverse the judgment of the military court * * *". Courts-martial have always operated "* * * in a self-sufficient system,

save only as *habeas corpus* was available to test their jurisdiction * * *," *Gusik* v. *Schilder,* 340 U. S. 128, 132.

Petitioner relies on the decision of the Court of Claims in *Shapiro* v. *United States,* 107 C. Cls. 650, where a claimant seeking back pay was allowed a collateral attack against a court-martial conviction.[1] In that case, the plaintiff's rights had been violated in a particularly flagrant fashion,[2] and the Court of Claims, without citation of any pertinent authority, permitted an action for back pay and thereby undeniably extended the traditional limitations of review of courts-martial by civil tribunals. Since that decision of the Court of Claims, this Court has reaffirmed the settled rule (see *supra,* pp. 7–8), and the *Shapiro* decision no longer has much vitality. Moreover, the Con-

[1] The other cases cited by petitioner as upholding the jurisdiction of the Court of Claims to entertain collateral attacks on a court-martial judgment do not support that contention. *Givens* v. *Zerbst,* 255 U. S. 11; *In re Grimley,* 137 U. S. 147; and *Hiatt* v. *Brown,* 339 U. S. 103 (cited at Pet. 19) all involved petitioners in confinement seeking a writ of *habeas corpus* to review a court-martial judgment. *Appell v. United States,* 130 C. Cls. 671 (Pet. 8, note 4), concerned an inoperative resignation of a commission, and had nothing to do with a court-martial. In *Runkle* v. *United States,* 122 U. S. 543 (*id.* at note 4), the claimant prevailed because his court-martial was never complete, the President having failed to approve it as required by law—a situation easily distinguished from the instant case where all required procedures have been completed.

[2] The Court of Claims characterized the court-martial proceedings as follows: "A more flagrant case of military despotism would be hard to imagine. It was the verdict of a supposedly impartial judicial tribunal; but it was evidently rendered in spite against a junior officer who had dared to demonstrate the fallibility of the judgment of his superior officers * * *". 107 C. Cls. at 653.

gress has recently acted so that the review and relief that petitioner seeks in the Court of Claims is now available by more appropriate procedures. Under Section 207 of the Legislative Reorganization Act (see p. 3, *supra*), civilian boards were established for each of the armed services with authority, upon request, to correct military records, and to make monetary payments found to be due after the correction of court-martial orders; see *Gordon* v. *United States,* 129 C. Cls. 270; *Goldstein* v. *United States,* 131 C. Cls. 228, certiorari denied, 350 U. S. 888; 40 Op. A. G. 504, 508; 41 Op. A. G. Nos. 1, 8, 35. And under Article 76 of the Uniform Code of Military Justice (64 Stat. 132, 50 U. S. C. 663), now in effect, it is provided that the sentences of courts-martial and dismissals pursuant to such sentences are final, and that courts-martial orders and action taken thereunder "shall be binding upon all departments, courts, agencies, and officers of the United States." Thus, Congress has provided an adequate remedy for claims such as that which petitioner here advances, within the framework of the military organization, and at the same time has declared its intent that civil tribunals refrain from interfering with the administration of military justice except for the traditional recourse to federal courts by *habeas corpus.*

2. As has just been noted, the usual method for testing the validity of a court-martial conviction is by an application for a writ of *habeas corpus.* Assuming that the court below had jurisdiction to entertain this action for back pay, it ought to follow—and indeed petitioner does not argue otherwise—that the

scope of review should be no broader than that afforded in actions initiated by application for the writ. In such proceedings, it is well established that review will lie only for defects in jurisdiction—not for questions relating to the guilt or innocence of the petitioner, nor mere irregularities of procedure or errors of law. *Burns* v. *Wilson*, 346 U. S. 137, 142; *Hiatt* v. *Brown*, 339 U. S. 103, 111; *In re Yamashita*, 327 U. S. 1, 8–9; *Lucas* v. *United States*, 121 C. Cls. 819. Such errors are left to be reviewed within the military hierarchy. The errors claimed in this case all fall into that class.

(*a*). Petitioner does not claim that the court-martial was without jurisdiction in the normal sense of lacking authority over his person or the offense with which he was charged (Pet. App. ii), but rather that the court-martial, although properly constituted at the outset, *lost* jurisdiction because of certain procedural irregularities occurring at the trial, primarily the admission of the testimony of witnesses Boellhoff and Krinkevitch from the record of the court-of-inquiry. The Government does not deny that the admission of this evidence may have been in contravention of Article 60 of the Articles for the Government of the Navy (*supra*, p. 2), but it does contend that this violation did not deprive petitioner of rights so fundamental to the fairness of his trial that it may serve as a basis for a collateral attack on the judgment of the court-martial. It has been held consistently that such failure of "jurisdiction" can occur only where the illegality is so gross as to deny to the trial the rudimentary requirements of justice. See *Johnson* v. *Zerbst*,

304 U. S. 458; *United States ex rel. Innes* v. *Hiatt*, 141 F. 2d 664 (C. A. 3) (and cases cited); *Lisenba* v. *California*, 314 U. S. 219, 236–237; *Chambers* v. *Florida*, 309 U. S. 227.

Where, as here, the alleged defect concerned the mere admissibility of certain items of evidence, the courts have not hesitated to strike down the complaint because the defects were not so serious as to void the jurisdiction of the trial court. *Burns* v. *Wilson*, 346 U. S. 137; cf. *United States ex rel. Innes* v. *Hiatt*, *supra*.[3] This accords with the principle that, with rare exceptions, collateral attack on the basis of supervening loss of jurisdiction should be permitted only in cases where the complainant did not have an adequate opportunity at the trial to assert his objection, and because the objection was based on facts outside the record the appellate tribunals did not have an opportunity fairly to pass upon the question. See *Whelchel* v. *McDonald*, 340 U. S. 122, 124; *Burns* v. *Wilson*, *supra*, at 154–155,

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[3] In the *Burns* case, this Court rejected the contention that the court-martial lost jurisdiction because the admission of certain confessions violated due process; see the opinion of Vinson, C. J., 346 U. S. at 145.

In *Innes*, the complainant alleged that the court-martial did not permit him to be present at every stage of the proceedings, in violation of Article 30 of the Articles of War. The court of appeals, in affirming the dismissal of the complaint, wrote: "* * * it may be that this occurrence * * * was in violation of the 30th Article of War * * * and might therefore have afforded grounds for the military reviewing authority to disapprove the findings * * * [but] * * * it could not in our opinion have so seriously affected the fundamental fairness of the trial as to deprive the court under the fifth amendment of its jurisdiction to adjudge and sentence the relator." 141 F. 2d at 667.

(dissenting opinion); *Johnson* v. *Zerbst, supra* at 467–468. In this case, petitioner's objection at the trial was duly recorded in the record and has been considered at each stage of the proceeding (see pp. 5–6, *supra*).

(*b*). Phrasing the same contention differently, petitioner also argues that the violation of Article 60—in itself, simply a limitation upon the admission of court-of-inquiry testimony in certain court-martial cases (see p. 2, *supra*)—is sufficient to void the jurisdiction of the military tribunal (Pet. 12–14). However, since Article 60 concerns the admissibility of evidence, failure to follow its mandate is precisely the type of procedural irregularity that civil courts have refused to review (see pp. 10–12, *supra*). As the Court of Claims noted (Pet. App. v–vi), it is only by contending that Article 60—which permits the admission of a great deal of testimony elicited at a court-of-inquiry—is itself unconstitutional that petitioner can raise his own complaint to the stature of a constitutional objection sufficiently important to affect the jurisdiction of the military court. In refusing to invalidate the entire article, the court pointed out that the admission of hearsay evidence is not in itself a violation of the Sixth Amendment. *Dowdell* v. *United States*, 221 U. S. 325, 330. Rather, the test is whether direct testimony is unavailable and the secondary evidence is inherently trustworthy. The holding here that Congress, in concluding that court-of-inquiry evidence is inherently trustworthy, had not

legislated in such unreasonable fashion as to deny rights under the Constitution was clearly correct.[4]

(*c*). Petitioner urges as an alternative ground for finding that the court-martial lost jurisdiction, because of procedural defects in the trial, the incident in which petitioner was directed to answer as to the truth of an incriminating writing. (Pet. 18). It is contended that this action infringed upon his rights under the Constitution and under Article 42 of the Articles for the Government of the Navy which provides that a witness need not answer "any question which might tend to incriminate or degrade him" (see p. 2, *supra*). Our discussion of the admission of testimony taken at the court-of-inquiry is equally apposite to this ground of collateral attack. See pp. 10–13, *supra*. There is also the additional consideration that the testimony so elicited did not serve to prejudice petitioner's cause. Since the writing was clearly admissible, the court below correctly pointed out that petitioner's frank answer could hardly have affected the court-martial since, in the event he had remained silent, it naturally would have been assumed that the contents of the statement

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[4] Petitioner also alleges that the court-martial lacked jurisdiction, at the outset, to pronounce a sentence dismissing him from the service (Pet. 3). This argument is based on the directive of Article 60 that evidence taken at courts-of-inquiry may be admitted only in cases where the offense is not capital nor the sentence one of dismissal from service. Since the court-martial could not know the nature of its decision until after the trial, it could not have lacked original jurisdiction because of the sentence pronounced. The argument really turns upon whether the admission of such evidence was an error of sufficient gravity to deny petitioner a constitutionally protected right—a contention we have discussed, *supra*, pp. 10–13.

were true. See Pet. App. vii. Where there is no prejudice, the civil courts will certainly not disturb the findings of a military tribunal. See *United States ex rel. Innes* v. *Hiatt, supra* at 667; *Fly* v. *United States*, 120 C. Cls. 482.

CONCLUSION

For these reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MARCH, 1957.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. 732

BURTON EDWARD GRAHAM,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITIONER'S REPLY TO BRIEF OF THE UNITED STATES IN OPPOSITION.

PRELIMINARY STATEMENT.

The brief of the United States in opposition (hereinafter cited as Br. Opp.) not only fails to meet our main contentions; it also seems to be based on certain misconceptions concerning the issues presented by this petition for a writ of certiorari. Moreover, there are some rather conspicuous omissions that should be pointed out, such as its failure to make even passing reference to several decisions of this Court cited and

discussed in the petition for their specific application to the reasons given for granting the writ, with particular reference to *Mullan v. United States.*[1]

Hence, this reply brief under Rule 24 is intended both for purposes of clarification, as well as by way of answer to new points presented in the brief in opposition.

ARGUMENT.

1. In our argument in the petition, we pointed out certain fundamental principles concerning the powers and jurisdiction of military tribunals that have become well established since the decision of this Court in the *Runkle* case.[2] They are that courts-martial are tribunals of special and limited jurisdiction, and that in order that their sentences may be given effect, it must affirmatively appear not only that the Court was legally constituted and that it had jurisdiction over the person of the accused, but also that the statutory provisions governing its proceedings have been complied with, and that its "sentence was conformable to law." (Pet. 17.) The absence of any of these indispensable conditions, as has been said, renders the judgment and sentence of a court-martial "*coram non judice* and absolutely void because such a judgment and sentence is rendered without authority of law and without jurisdiction." *Johnson v. Zerbst,* 304 U.S. 458.

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[1] *Mullan v. United States,* 212 U.S. 516 (Pet. 11, 12, 16.)

[2] *Runkle v. United States,* 122 U.S. 543. See also *McClaughery v. Deming,* 186 U.S. 49, and *Givens v. Zerbst,* 255 U.S. 11.

To recapitulate, its is our position in the light of the foregoing propositions that the court-martial was without jurisdiction to pronounce the sentence of dismissal in the instant case for either or both of the following reasons: (1) because the sentence of dismissal was one that was beyond its statutory powers and which, in addition to flouting the mandate of Congress, was also expressly forbidden under the administrative regulations and directives of the Navy; and further, (2) that the court-martial lost jurisdiction to impose the sentence that it did because the petitioner was denied due process and deprived of his rights under the Fifth and Sixth Amendments to the Constitution. (Pet. 3.)

There are no constitutional questions involved in the first of the foregoing propositions, since, if the court-martial in fact transcended its sentencing powers, it thereby rendered a judgment that was null and void. (Pet. 17.)

Notwithstanding the importance of *Runkle v. United States* here, that decision is relegated to a footnote at page 8 of the Government's brief. The Government attempts to distinguish it by stating incorrectly that the claimant prevailed in the *Runkle* decision "because his court-martial was never complete, the President having failed to approve it as required by law * * *." The opinion must have received rather cursory attention, since no question of this kind was involved. Major Runkle, like the petitioner here, was tried before a properly constituted court-martial, and upon conviction was punished by a sentence of dismissal. The

Articles of War in force at the time required the approval of the President for a sentence of dismissal of a commissioned officer in time of peace. The Court decided that the sentence of dismissal was invalid since "we cannot say it positively and distinctly appears that the proceedings of the court-martial have ever in fact been approved or confirmed in whole or in part by the President of the United States." 122 U.S. 543.

2. Article 60 of the Articles for the Government of the Navy permits the use of a record of a Court of inquiry as evidence before a court-martial in a proper case, subject to certain conditions and safe-guards prescribed by Congress. One of these is the provision that expressly limits such use to cases "not capital nor extending to the dismissal of a commissioned or warrant officer."[3]

The Government's brief argues, nevertheless, that Article 60 is to be construed only as an exception to the hearsay rule, and its violation as a mere error of law. This position seems untenable in view of the plain language of the statute. Moreover, it is also contrary to this Court's views when called upon to interpret this very section in *Mullan v. United States,*

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[3] What Congress intended by this article has been well expressed in the following language in a decision by a Navy reviewing board:

> "In legislating that the proceedings of a court of inquiry shall be evidence before a court-martial in certain defined cases, *Congress did not undertake to curtail the rights of an accused* but to enact a law which would render more effective court-martial proceedings * * * in cases not capital *nor extending to the dismissal of a commissioned or warrant officer.*" (Emphasis added.) (C.M.O. 190, 1918, 20; Pet. 15-16.)

supra. It is likewise in collision with the rulings and interpretations that have always been consistently followed by the Navy Department, itself.

In the *Mullan* case, discussed at length in our petition (Pet. 11-12, 16), this Court very definitely did not treat Article 60 as a mere rule of evidence, but, on the contrary, fully recognized the constitutional implications that might arise when a Court of inquiry record is used contrary to its provisions. The court-martial in the *Mullan* case, as pointed out in our previous discussion, was convened at the request of the accused. This was granted only after Mullan had entered into a formal stipulation for the unconditional use of a former Court of inquiry record, this Court holding that he thereby waived his right of confrontation.

The opinion in the *Mullan* case reflects this Court's views as to the proper interpretation and effect to be given to Article 60, however, and its importance and relevancy here could hardly be overlooked under ordinary circumstances. It is therefore of considerable significance here that the Government's brief not only fails to discuss the *Mullan* case, but also avoids it—by avoiding mention of it.

Furthermore, the Navy Department, as pointed out in our petition (Pet. 14-16), has always regarded Article 60 as having the same force and effect as did this Court in arriving at its decision in the foregoing case. Thus, Section 455, Naval Courts and Boards (1937 Ed., Pet. App. xxiv), which is included in a chapter dealing in part with the limitations on the punitive powers of Navy Courts, provides:

"455. *Limitation when the record of proceedings of a court of inquiry is used.* In any case in which the proceedings of a court of inquiry is used in evidence by reason of the fact that oral testimony cannot be obtained, as authorized by article 60, A.G.N. and section 220, the *maximum punishment* which may be imposed for an offense committed either in time of peace or in time of war *shall not extend to death, or to the dismissal of a commissioned or warrant officer.* * * *" (Emphasis added.)[4]

In short, to hold that the glaring violation of the Articles for the Government of the Navy here involved was no more than an inconsequential error of law, as contended in the Government's brief, would do violence to the judgment and opinion of this Court and the long established rulings and interpretations of the Navy Department.

In a footnote, the Government also says in connection with the point in question: "Since the court martial could not know the nature of its decision until after the trial, it could not have lacked original jurisdiction because of the sentence pronounced." (Opp. Br. 13.) This, although we have at no time contended that the court-martial was without jurisdiction in the

[4]Section 220 of the same authority states that a court of inquiry record may be used in a case in which death or dismissal would otherwise be a permissible, but not a mandatory, penalty, but likewise carefully cautions the law enforcement officers of the Navy that "in any case in which the proceedings of a court of inquiry are so used in evidence under article 60, A.G.N., *the court must be careful not to adjudge a sentence extending to death or dismissal.*" (Pet. App. xxiv.)

first instance. It seems apparent that the Government's brief has missed our point; namely, that the directive in Article 60 was a limitation on the court-martial's sentencing power, and that our present contention goes to the validity of the sentence, not to the original jurisdiction of the court-martial to try petitioner.

3. Assuming, *arguendo,* that the sentence imposed by the court-martial was not otherwise invalid, we now turn to the question as to whether the court-martial lost jurisdiction to pronounce it by denying petitioner his right to be confronted by and to cross-examine witnesses. The Government's brief concedes, of necessity, that the court-martial would have lost jurisdiction to impose the sentence if petitioner's fundamental rights were violated. It is contended, however, that the flagrant violation of its own rules by the Navy in connection with petitioner's trial was an ordinary error of law, involving "the mere admissibility of certain items of evidence" and was not one "so serious as to void the jurisdiction of the trial court." (Opp. Br. 10-11.)

These arguments would seem to be answered by this Court's opinion in *Mullan v. United States,* supra, where a violation of the conditions prescribed by Congress was regarded more seriously, the Court holding that the use of a Court of inquiry record under Section 60 in a case involving a commissioned or warrant officer where the penalty of dismissal is invoked *does* deprive him of his fundamental right of confrontation, unless this right has been waived.

According to the dissenting opinion in the Court below, Article 60 was not in fact involved in this case. The author of that opinion based this theory on the ground that the article "applies only to cases not capital nor extending to the dismissal of a commissioned or warrant officer." (Pet. App. viii.) As we have heretofore said, this conclusion would seem to be consistent with this Court's reasoning in deciding the *Mullan* case. (Pet. 16.) And in C.M.O. 190, 1918, 20, a Navy Board of Review was of the same opinion in dealing with a court-martial case where a Court of inquiry record was used, but not sanctioned by Article 60.[5]

Under any view of the situation, however, it would seem stultifying to hold that a court-martial could rely upon a Court of inquiry record to procure the conviction of an accused, and thereafter violate the limitation of Article 60 as to punishment, without infringing upon his constitutional rights.

4. The Government's most serious contention appears to be its claim that the validity of the judgment of military tribunals can only be questioned in civil Courts by *habeas corpus*. The decisions of this and other Federal Courts make it clear that insofar as their jurisdictional requirements are concerned, the judgments of courts-martial have no more immunity

[5] "Whereas article 60 of the Articles for the Government of the Navy provides for the introduction of the proceedings of courts of inquiry as evidence before courts-martial, and C.M.O. No. 46, of 1917, sets forth at length the conditions under which the provisions of this article may be available, *it is obvious that in this case the aforementioned statute did not apply.*" (Emphasis added.) (C.M.O. 190, 1918, 20; Pet. 15.)

from collateral attack than do the judgments of other Courts forming part of our ordinary judicial system.

We have already pointed out that this Court, in *Runkle v. United States,* supra, upheld the right to a collateral attack upon the judgment and sentence of a court-martial in an action to recover back pay in the Court of Claims. This was followed by a similar decision in *United States v. Brown,* 206 U.S. 240. These cases were the precedent for the decisions of the Court of Claims in *Shapiro v. United States,* 107 C.Cls. 650, and *Appell v. United States,* 130 C.Cls. 671.[6]

Although *Givens v. Zerbst,* 255 U.S. 11, dealt with a *habeas corpus* proceeding, this Court stated unequivocally there that: "courts martial are tribunals of special and limited jurisdiction whose judgments, so far as questions relating to their jurisdiction are concerned, are always open to collateral attack."

More recently, this Court considered and set forth the precedents and backgrounds for the general rule

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[6]We have heretofore shown that the Government's attempt to distinguish the facts of the *Runkle* case was based on an erroneous impression as to the matters that were before the Court for determination. In the same footnote (Opp.Br. 8) it is suggested that *Appell v. United States* should be rejected as authority on the ground that it was concerned with "an inoperative resignation of a commission, and had nothing to do with a court-martial." More accurately, the question presented there was whether or not the army corps to which Appell was attached as a reserve officer had improperly denied him the right to withdraw a resignation from the Army which he had previously been persuaded to submit. In order to arrive at its decision, it was therefore obviously necessary for the Court of Claims to collaterally review and pass upon the validity of the action taken by the Army.

permitting collateral attacks on the judgments of military tribunals before the civil Courts in footnote 3 of its opinion in *Gusik v. Schilder,* 340 U.S. 128. What is said in this footnote is of more than historical significance here.

It is true that some of the *habeas corpus* cases cited in the Government's brief do include language to the effect that, in the absence of physical confinement, the Courts cannot interfere with the proceedings of military tribunals, and that they may be collaterally reviewed only under the judicial power to grant writs of *habeas corpus.* These statements, in context, plainly refer to the kind of interference and review in contemplation from the very nature of a proceeding for a writ of *habeas corpus.*

Although an application for a writ of *habeas corpus* is undoubtedly a collateral proceeding, the issuance of the writ operates as a direct interference with the judgments decreed by military tribunals. The writ is directed to the officers having custody of the accused, and prevents them from carrying out the decisions or orders of the military authorities insofar as they involve confinement or restraint. Of course, it is only through *habeas corpus* that the civil Courts may thus "interfere" with the control of the military tribunals over their own proceedings. This is not to say, however, that the judgment of a court-martial which it had no jurisdiction to render must nevertheless be recognized when the validity of the judgment is otherwise properly in issue before a Court having separate but equal jurisdiction in a civil proceeding.

5. Finally, the Government takes the position that petitioner's judicial remedy is barred by the provisions of the Uniform Code of Military Justice, and that his only recourse was to the Board for the Correction of Naval Records under Section 207 of the Legislative Reorganization Act.

The first contention overlooks the fact that this case arose before the adoption of the Uniform Code of Military Justice. (Pet. 3, 20.) Petitioner therefore has had no recourse to its provisions for appellate review, including the right of appeal to the Court of Military Appeals. He had no way of knowing that the Navy court-martial would violate and disregard its own rules by imposing the sentence of dismissal until after the sentence was actually published and confirmed. He has therefore had no effective review of any kind within the naval hierarchy of appellate review, such as might otherwise be a matter for consideration under recent decisions of this Court.[7]

Even if the Uniform Code of Military Justice did apply, the finality clause referred to in the Government's Brief (Article 76, Uniform Code of Military Justice; 50 U.S.C. 663) would in no event cut off the right of resort to a constitutional Court, such as this, to a petitioner who claims that his constitutional rights have been denied, or that the judgment of a military tribunal was, for other reasons, without jurisdiction. Congress did not and could not repeal the general jurisdiction of this Court by implication in adopting the

[7] *Burns v. Wilson*, 346 U.S. 137; *Whetchell v. McDonald*, 340 U.S. 122; see also Pet. 20.

Uniform Code of Military Justice. A clause of this kind has the effect of "doing no more than describing the terminal point for proceedings within the court martial system." *Gusik v. Schilder,* 340 U.S. 128.

Nor may petitioner, as the Government suggests, look further to the Board for the Correction of Naval Records for relief. He had already sought his remedy before that board before commencing his suit in the Court of Claims. The Board denied his application, not on its merits, but because the Board ruled that since the Uniform Code of Military Justice was adopted while the matter was under submission, they thereby lost jurisdiction to grant the relief sought by petitioner's application.

Dated, San Francisco, California,
March 20, 1957.

Respectfully submitted,

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